No. 87-111

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Supreme Court of the United States

OCTOBER TERM, 1987

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5 WEST 14TH OWNERS CORP.,

Cross-Petitioner,

v.

WEST 14TH STREET COMMERCIAL CORP.,
WEST 14TH STREET GARAGE CORP., AND
WEST 14TH STREET LAUNDRY CORP.,

Cross-Respondents.

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR CERTIORARI

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Is a lease of commercial space, subleased to an army-navy surplus goods store, a bridal shop, a gift shop and a variety store in a residential housing cooperative a contract for the operation, maintenance or management of the cooperative association, or of property "serving" the unit owners of that cooperative within the meaning of 15 U.S.C. § 3607(a)(1)?

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Cross-Respondents West 14th Street Commercial Corp. ("Commercial Corp."), West 14th Street Garage Corp. ("Garage Corp."), and West 14th Street Laundry Corp. ("Laundry Corp."), respectfully request that this Court deny the cross-petition of cross-petitioner 5 West 14th Owners Corp. (the "Cooperative") for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the within proceeding on March 18, 1987 and reported at 815 F.2d 188 (2d Cir. 1987) (App. A, 1a-25a).[1]

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[1] References abbreviated "(App.)" are to pages in the Appendix in cross-respondents' petition in No. 86-1990.

COUNTER STATEMENT OF THE CASE

The circumstances surrounding this litigation have already been discussed in cross-respondents' petition for a writ of certiorari in No. 86-1990. Only a few factual matters not discussed in any of the previous filings with this Court need be addressed here.

At issue in the cross-petition is the correctness of the Second Circuit's decision that a commercial lease between the cross-petitioner Cooperative as landlord and Commercial Corp. as tenant is not a contract for the operation, maintenance or management of property "serving the cooperative unit owners" within the meaning of the Condominium and Cooperative Abuse Relief Act (the "Abuse Relief Act"), 15 U.S.C. § 3607. 815 F.2d at 201 (App. A, 25a). The lease grants beneficial use of the commercial space to Commercial Corp. for a period of 20 years, with several options thereafter, and is subject to the requirement that the space be used only "for sale of retail goods to the public." (JA 23).[2] Commercial Corp. has in turn subleased the space to four stores which perform that function: a bridal shop, an army-navy store, a gift shop, and a variety store. (JA 13). The lease requires Commercial Corp. to pay rent to the Cooperative regardless of whether it collects rent from a commercial subtenant. (JA 438).

This lease is to be distinguished from the separate management contract between Parman Co., the sponsor of the conversion to cooperative ownership, and the Cooperative under which Parman provides management of some of the Cooperative's affairs. Parman's duties included the collection of maintenance charges, the payment of expenses, the preparation of budgets, shareholders' lists, and the supervision of the Cooperative's employees. (JA 115-117). The management contract is not part of this litigation.

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[2] References abbreviated "(JA)" are to pages in the Joint Appendix in the Court of Appeals.

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

The Master Commercial Lease is not a Contract for the Management of the Cooperative, or of Property Serving the Unit Owners of the Cooperative

The Abuse Relief Act provides for the termination of "any contract" which provides for operation, maintenance or management of a condominium or cooperative association in a conversion project, or of property serving the condominium or cooperative unit owners in such project. 15 U.S.C. § 3607(a)(1). Based on this statutory language, the Cooperative makes two separate arguments: first, that the commercial lease is a management contract for the management of the "cooperative association", and second, that the lease is a contract for the management of property serving the unit owners. The Cooperative's contentions are so misplaced that the issues are not worthy of this Court's review.

The first contention, that the commercial lease is a "management contract" of the "association" cannot withstand the slightest scrutiny. The tenant under the commercial lease, Commercial Corp., did not undertake to manage the Cooperative: i.e., to pay the Cooperative's expenses, supervise its employees, prepare budgets, and run its meetings. The developer of the project, Parman Co., entered into precisely this type of management contract, which is not part of this litigation. At most, the commercial lease provides for the operation and management of property belonging to the Cooperative.[3] However, the statutory test is not whether the property *belongs* to the Cooperative. The statute requires that the contract provide for the operation, maintenance or management of the *cooperative association.* 15 U.S.C. § 3607(a)(1).

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[3] One important feature of a management contract is missing from the commercial lease. In a management contract, one party manages property for another for a fee, but the risk of loss is on the owner. Here, the risk of loss and the possibility of profit remains with Commercial Corp., the tenant. The Cooperative receives the same rent regardless of how well or poorly Commercial Corp. performs in leasing the space.

Nor is the commercial lease a contract for the management of property serving the unit owners. As the Second Circuit properly found, the statutory test — that the property serve the unit owners — refers to property providing services which the owners should reasonably expect as an adjunct to living in the apartment building. 815 F.2d at 198-199 (App. A., 20a-21a). The Second Circuit did not create this standard out of thin air, as the Cooperative's brief implies. Rather, the Second Circuit's explanation of what property serving the unit owners means is founded squarely in the legislative history. The federal statute was designed so that "the [cooperative] association can terminate certain contracts and leases which are *critical to the operation* of the [cooperative] and to the unit owners' full enjoyment of their rights of ownership." (emphasis added). *Condominium Housing Issues: Hearings on S.612 Before the Subcom. on Housing and Urban Affairs*, 96th Cong., 1st Sess. 581 (1979) (Statement of Jay Janis, Under-Secretary, Department of Housing and Urban Affairs). Indeed, the entire focus of the Congressional discussions of the Abuse Relief Act concerned abusive leases in Florida, where the developer maintained control, through retention of leasehold interests of recreational facilities essential to unit owners' "full enjoyment of their rights of ownership." There is not the slightest indication in the legislative history that Congress intended to interfere with leasing practices for hundreds of commercial stores at cooperatives throughout New York.

There also can be no question that the Second Circuit correctly applied the statutory standard. The property at issue consists of four stores, an army-navy store, a bridal shop, a gift shop and a variety store in a densely populated area of Manhattan (JA 13), and the lease requires that the stores be used only for the sale of retail goods to the public. (JA 23). Under no circumstances can these properties be said to serve the unit owners.

The Cooperative's arguments would be much more plausible had the statute been worded to provide for termination of any contracts relating to "property owned by the cooperative." Had Congress intended such a result, it could have easily written the statute in this way. The Cooperative correctly notes that the test approved by the Second Circuit requires a court to examine

whether the property serves the unit owners on a case by case basis. However, Congress's choice of words, which focus on how property is used, mandates such an inquiry. As interpreted by the Second Circuit, that test is simple to apply.[4]

Nor should this Court be swayed by the Cooperative's claim that the Second Circuit's decision would undercut the Congressional intent that these contract terminations be non-judicial. Congress recognized that a party must have the right to challenge whether the statute is being properly applied. That is precisely why Congress provided an express grant of jurisdiction for cases arising under the statute. 15 U.S.C. § § 3611, 3612. 815 F.2d at 193-194 (App. A, 9a-11a). Plainly, valuable property rights should not be taken away simply upon the say-so of private individuals, and with no opportunity for a court to review the correctness of a cooperative's actions.

CONCLUSION

As we indicated in our petition for a writ of certiorari, this case does present important issues relating to national housing policy. However, the cross-petition is of extremely limited scope. Indeed, the Cooperative's real quarrel is with how the statute is written and with the legislative history. The Second Circuit cor-

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[4] There is no inconsistency between the Second Circuit's decision and this Court's finding in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), that stores at Co-op City, a self-contained community comprised of a 50,000 resident development of 35 high-rise buildings and more than 200 townhouses, were essential services for residents of that huge complex. The character of the community affects the outcome. West 14th Street in Manhattan is a busy commercial thoroughfare with hundreds of stores serving the residents of the vicinity and the city as a whole. Accordingly, with stores in abundance throughout the neighborhood, the Cooperative clearly cannot argue in good faith that a bridal shop or army-navy store are essential to the tenant shareholders' "full enjoyment of their rights of ownership." In contrast, if there were no bridal shop or army-navy store at West 14th Street, the residents would not notice the difference. If there were no grocery stores at Co-op City, virtually a self-contained community, the residents would find living there intolerable.

rectly interpreted the statute as it pertained to the commercial lease, and for that reason, the cross-petition should be denied.

Respectfully submitted,

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